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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1090

WILLIE LEE TERRELL, JR.,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States
Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Willie Lee Terrell, Jr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Fifth Circuit entered in the above entitled case on January 20, 1975.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit was not published, but is included in the appendix as Exhibit A. No opinion was rendered by the United States District Court for the Southern District of Florida. A copy of the judgment of such Court is included in the appendix as Exhibit B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 29, 1975. No petition for rehearing was filed. This Court has jurisdiction to review this case under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, in a criminal tax pro-

secution, an individual is entitled to a charge that his financial circumstances should be considered in determining willfulness; and a charge to the effect that an act or omission is not willful if the person believes it justified.

2. Whether §3121(o) of the Internal Revenue Code of 1954 is unconstitutional since it creates an irrebuttable presumption of fact in violation of the due process clause of the Fifth Amendment.

Constitutional Provisions and Statutes Involved

United States Constitution
Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

26 U.S.C. §3121(o)

"Crew Leader.--For purposes of this chapter, the term 'crew leader' means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person; and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader. For purposes of this chapter and chapter 2, a crew leader shall, with respect to service performed in furnishing individuals to perform agricultural labor for another person and service performed as a member of the crew, be deemed not to be an employee of such other person."

26 U.S.C. §7202

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for any pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. §7203

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution."

Statement of the Case

The defendant was convicted on two counts of willfully failing to truthfully account for and pay over to the Internal Revenue Service employment taxes imposed by §§3101 and 3111 of the Code in violation of §7202 of the Code, and on two counts of failing to file an Employer's Annual Tax Return for Agricultural Employees for each of the years 1970 and 1971 in violation of §7203 of the Code.

The facts in this case were not in dispute. The defendant was a "crew leader" during the years in question, i.e. an individual who obtained and delivered migrant labor to perform agricultural services. In this case, the farmer was Flavor-Pict. Defendant received $1.65 per hour for his services;

$1.00 per day for each migrant worker delivered; and an amount from Flavor-Pict to cover the employer's share of FICA taxes and minimal accounting costs. As a condition to his services, defendant was required to furnish a bus for transporting migrant labor, and a pickup truck.

In addition to his activities as a crew leader, defendant did some hauling for Flavor-Pict from time to time.During the years 1970 and 1971, defendant received $18,000.00 and $17,000.00, respectively, from Flavor-Pict, which included the employer's share of the taxes.

At the trial, defendant testified at length as to the expenses of operating his business, and the total lack of funds to satisfy tax liabilities after

the payment of other expenses. He admitted that he was aware of the tax liabilities, but that he preferred other creditors over the United States because the other creditors would have repossessed his automotive equipment and put him out of business. He also testified that he had a long history of paying his tax liabilities late; that he had, in the past, worked matters out with the Internal Revenue Service; and that it was his belief that he was required to file returns only if he had the money to pay, since that was the procedure he had consistently followed.

Based upon the foregoing, the defendant requested charges to the effect that financial circumstances should be considered in determining willfullness; and that conduct was not willful if the

person believed it to be justified. The Court refused both charges.

In addition, the existence of an employer status is an essential element of the crime. In this connection, §3121(o) of the Code defines an employer as including a crew leader, which is defined as follows:

> "***the term 'crew leader' means an individual who furnishes individuals to perform agricultural labor for another person if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by then***and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader."

At the trial, it was contended that such creates an irrebuttable presumption; that such results in classifying an individual as an employer without re-

gard to the actual facts of the controversy; and that such an irrebuttable presumption violates the due process clause of the Fifth Amendment.

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the Court of first instance is 18 U.S.C. §3231.

Reasons for Granting this Writ

Defendant's arguments can be divided into two parts, to wit: (1) that relating to the impropriety of the charge with respect to willfulness in a federal tax offense; and (2) that relating to the constitutionality of §3121(o).

With respect to the charge, it is submitted that the holding of the Fifth Circuit in this case is in direct conflict with the decision of the Ninth Circuit in Wilson v. U.S. 250 F. 2d 312

(9th .Cir. 1957); and does follow the rationale of Abdul v. U.S. 254 F. 2d 292 (9th Cir.1958), which rationale was specifically rejected by this Court in U.S. v. Bishop 412 U.S. 346 (1973)

More specifically, the taxpayer here, as in Wilson, defended on the grounds that the use of funds to maintain a business as opposed to utilizing those funds to satisfy tax liabilities should be considered in determining willfulness. The evidence in both cases showed the lack of funds, and in Wilson, the Court held that such should be considered in determining willfulness. The District Court and Fifth Circuit in this case effectively held to the contrary by refusing any charge relating to financial circumstances.

Here, also, as in Abdul, the defense

against the failure to file was a misunderstanding of his duty to file tax returns. In this instance, the defendant testified that he believed that he could not file the returns until he was able to make payment. Although the Ninth Circuit in Abdul held that such was not a proper defense, such holding was specifically rejected by this Court in Bishop. In effect, the Fifth Circuit here, as did the Ninth Circuit in Abdul, refused to give any consideration to the fact that the defendant believed his conduct to be justified.

The second facet of defendant's argument relates to the constitutionality of §3131(o) of the Code. That section, in effect, contains a conclusive presumption that a crew leader is an employer, without regard to the actual

facts and circumstances. In effect, this statute created an irrebuttable presumption, and it is this classification without regard to the actual facts that renders the statute in question so arbitrary and unreasonable that it cannot stand under the Fifth Amendment. Heiner v. Donnan 285 U.S. 312 (1932); Vlandis v. Kline 412 U.S. 441 (1973).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert O. Rogers
Counsel for Petitioner
400 Royal Palm Way
Palm Beach, Florida

Certificate of Service

I hereby certify that on the 14th day of March, 1975, the foregoing petition for a Writ of certiorari was served upon the Respondent by mailing a copy thereof by United States mail, postage prepaid, as follows:

Mr. Meade Whitaker
Chief Counsel
Internal Revenue Service
Washington, D.C. 20224

Mr. Robert Bork
Solicitor General
Room 5612
U. S. Department of Justice
Washington, D.C. 20530

Robert O. Rogers
Counsel for Petitioner

Exhibit A

In the United States Court of Appeals
For the Fifth Circuit

No. 74-3074

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

WILLIE LEE TERRELL, JR.,
Defendant-Appellant

Appeal from the United States District Court fof the Southern District of Florida

(January 29, 1975)

Before GEWIN, BELL and CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

Appellant was convicted of knowingly and willfully failing to make an employer's annual tax return for agricultural laborers and knowingly and willfully failing to truthfully account for and

1/See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F. 2d 966.

pay taxes pursuant to the Federal Insurance Contributions Act in violation of 26 U.S.C. §§7202 and 7203. The years 1970 and 1971 are involved. On this appeal he contends that (1)26 U.S.C. §2131(o) defining the term "crew leader" is unconstitutional; (2) the court erred in refusing to charge the jury that the financial status of the appellant should be considered in determining willfulness; and (3) the court erred in refusing to charge the jury that his conduct was not willful if he honestly believed it to be justified. After a thorough examination of the briefs,the record and the contentions of appellant at oral argument we find no merit in any of his alleged errors.

Exhibit B

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA)
)NO.74-349-Cr-CF
versus)
)Filed: 7-26-74
WILLIE LEE TERRELL, JR.)

On this 26th day of July, 1974, came the attorney for the government and the defendant appeared in person and by David S. Meisel, Esq., Counsel.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of knowingly failing to make a 1970 and 1971 Employer's Annual Tax Return for Agricultural Employees, IRS form 943, with either the District Director of the Internal Revenue Service at Jacksonville,

Florida, or with the Director, Southeast Service Center, Chamblee,Georgia, all in violation of Title 26, United States Code, §7203, and wilfully failing to truthfully account for and pay over to the Internal Revenue Service Federal Insurance Contributions Act taxes due respectively January 31, 1971, and January 31, 1972; all in violation of Title 26, United States Code, §7202, as charged in the Information, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for a period of ONE (1) MONTH or until otherwise discharged as to each of Counts I and III, sentences of confinement to run concurrently with each other, and EIGHTEEN (18) MONTHS or until otherwise discharged as to each of Counts II and IV, sentences of confinement to run concurrently with each other, it being further

ORDERED and ADJUDGED, pursuant to the split-sentence provision of Title 18, United States Code, Chapter 231, §3651, that the defendant be confined to a jail-type institution for a period of THREE (3) MONTHS as to each of Counts II and IV, sentences of confinement to run concurrently with each other, it being further

ORDERED and ADJUDGED that the sentences imposed in Counts II and IV shall run consecutively with those imposed in Counts I and III, thus making a total period of incarceration of FOUR (4) MONTHS, it being further

ORDERED and ADJUDGED that the remainder of sentences of confinement as to Counts II and IV shall be suspended, and commencing immediately upon discharge from incarceration, the defendant shall be placed on probation for a period of TWO (2) YEARS under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964, it being further

ORDERED and ADJUDGED that in addition to the terms of imprisonment hereinabove imposed, the defendant shall pay a fine onto the United States of America in the

sum of $1,000.00 on each of Counts II and IV, totalling $2,000.00, it being further

ORDERED and ADJUDGED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Charles B. Fulton
Chief U. S. District Judge

cc: U.S. Attorney
U.S. Probation
U.S. Marshal
David S. Meisel, Esq.

Certified to be a true and correct copy of the original,
Joseph I. Bogart, Clerk
U.S.District Court
Southern Dist. of Fla.
By: s/ Susan Ringlein
Dy. Clerk
7-26-74